No. 11747

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership doing business as FULLERTON MANUFACTURING COMPANY,

Appellants,

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,

Appellee.

BRIEF OF APPELLANTS.

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The District Court erred:

1. In making so much of finding of fact number VII as finds that a report of values was due on December 31, 1945, and was delinquent on January 31, 1946.

2. In making finding of fact number VIII.

3. In making conclusion of law number I that appellants were only entitled to judgment against defendant in the sum of $1,936.92 and in failing to conclude that appellants were entitled to judgment in the sum of $13,798.50.

4. In denying appellants' motion for new trial and to open the judgment and take additional testimony.

5. In failing to find that under the terms of the policy even if a report of values was due on December 31, 1945, and delinquent on January 31, 1946, since such report was the first report due under the policy and there was no penalty for delinquent filing, the applicable limit of liability was that set forth in the last portion of paragraph 9 (the coinsurance clause).

6. In failing to find that under the terms of the policy the first report of values was not due until January 31, 1946, and not delinquent until 30 days thereafter, and therefore the report of values filed on February 26, 1946, complied with the policy terms.

7. In finding that the report of January 3, 1946, was a report under the new policy and limited appellants' recovery to the sum of $1,936.92.

ARGUMENT.

I.

Summary of Argument.

Appellants' contentions may be summarized as follows:

1. Under this provisional reporting form policy with its value reporting clause and honesty clause, once the first monthly report of values is filed, the insured's recovery is thereafter limited by his last report of values, if he underreports his values; and once the first monthly report of values is filed, if the insured is thereafter delinquent in his monthly reports, his recovery is limited to the amount reported in his last report of values. But under the express provisions of the policy, between the inception date of the policy and the filing of the first report of values, the insured's recovery is limited only by the limit of liability and the coinsurance clause; and this is so even though the first report of values is delinquent, because the policy expressly provides that in that event the policy shall still "cover," but only at the locations specified in the policy. To hold, as the district court did, that delinquency in filing the first report voids the policy is to read into it a provision which is directly contrary to the policy provisions, and contrary to applicable rules of construction.

2. Since the policy was written on the 31st day of December 1945 for one year and required the filing of monthly reports of value (with a 30 day grace period) on the "last day of each month of the policy term," the

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No. 11747

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. Wallace and E. B. Landry, a copartnership doing business as Fullerton Manufacturing Company,

Appellants,

vs.

World Fire and Marine Insurance Company of Hartford, Connecticut, a corporation,

Appellee.

BRIEF OF APPELLANTS.

Jurisdiction.

This action was brought in the District Court by reason of diversity of citizenship (28 U. S. C. A., sec. 41 (1)), the plaintiffs being residents of California and the defendant being a Connecticut corporation and a resident of that state [Tr. 2]. The amount sued for was $13,798.50, exclusive of interest and costs [Tr. 7].

The case comes within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions at law or in equity, as provided in 28 U. S. C. A., section 225. The judgment was entered in the District Court on March 25, 1947 [Tr. 47]; appellants' motion for a new trial was filed on March 31, 1947 [Tr. 59], and was

denied by order of the District Court on June 2, 1947 [Tr. 68]. Notice of appeal from the judgment was filed on August 26, 1947 [Tr. 69].

Where a motion for new trial is seasonably filed, the time to appeal does not commence to run until disposition of the motion.

Morse v. United States, 270 U. S. 151, 70 L. Ed. 518;

Aspen Mining etc. Co. v. Billings, 150 U. S. 31, 37 L. Ed. 986.

Statement of the Case.

This action was brought by appellants to recover the sum of $13,798.50 alleged to be due on a "Provisional Reporting Policy" of fire insurance issued by appellee to appellants, and covering appellants' stock of merchandise consisting principally of oil well tools manufactured or in process of manufacture [Exhibit 1,[1] Tr. 2-7]. Judgment was for appellants in the sum of $1936.92 [Tr. 46].

The policy was issued by appellee to appellants for a term of one year commencing at noon on December 31, 1945 [Exhibit 1]. On February 14, 1946, merchandise insured by the policy and which was then of a value of $29,625.20 was damaged by fire in the sum of $27,253.18 [Agreed Statement, par. V, Tr. 27]. Subsequently, appellants filed proof of loss with appellee setting forth that the amount of their loss was $27,253.18, and that under the terms of the policy there was due the sum of $13,-

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[1]The original exhibits have been transmitted to this Court and by order of this Court have been omitted from the printed record [Tr. 91]. For the convenience of the Court and wherever necessary the pertinent portions thereof will be reproduced in this brief.

798.50. The appellee admitted the amount of the loss but denied that it owed appellants anything [Findings, par. VII, Tr. 44].

The case was tried on an agreed statement of facts [Tr. 26-9], and hence there is no dispute as to the facts. The dispute between the parties concerns the interpretation of those provisions of the policy relating to the filing of reports of values by the insured and to the method of determining the amount of the insurer's liability.

The pertinent provisions of the policy are contained in the printed rider attached to the policy entitled "Provisional Reporting Policy Form No. 1 (Monthly Average)." This type of policy is intended for use where an insured has a stock of fluctuating value. The policy does not insure the merchandise covered for a specified amount but provides:

> "2. 'Provisional Amount Clause': The amount of insurance provided for hereunder is provisional and is the amount on which the deposit premium is based, it being the intent of this insurance to insure hereunder the actual cash value of the property described herein subject to the limits of liability and provisions for other insurance hereinafter provided."

It is then provided that:

> "3. 'Limit of Liability': This policy being for the provisional amount of $4,400.00 being 100% of the total contributing insurance, liability of this company is limited to the same percentage of any loss and in no event to exceed the same percentage of each of the following limits * * *

Item Number	Limit of Liability for all Contributing Insurance		Location Street Number and city
1	$15,000.00	at	345 E. Santa Fe, Fullerton, California

> * * *"

It is clear from the form that the provisional amount of $4,400.00 is used only to compute the deposit premium and in no way limits or affects the amount of recovery in the event of loss.

Then comes the "Value Reporting Clause" (paragraph 8) which provides for the filing of monthly reports of values by the insured and specifies the penalty for delinquent filing:

> "8. 'VALUE REPORTING CLAUSE.'
>
> (A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.
>
> (B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein."

Then comes paragraph 9, the "Full Reporting Clause" (commonly called the "honesty" clause). The effect of this clause is to penalize an insured who underreports his values by limiting his recovery to the proportion his last report of values bears to the actual values. This same clause also contains what is commonly known as a co-

insurance clause; that is to say, the recovery is limited to the proportion that the limit of liability (here $15,000.00) bears to the actual value of the property. In other words, if the limit of liability is only 50% of the actual value of the property insured, the insured can never recover more than 50% of his loss, and so he, in effect, becomes a co-insurer as to 50% of the risk. This clause reads as follows:

> "9. 'Full Reporting Clause.' Liability under this policy shall not in any case exceed that proportion of any loss hereunder * * * which the last value reported to this company prior to the loss * * * bears to the actual cash value of the property above described * * *. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss."

Since it is around these two paragraphs (8 and 9) that the dispute revolves, we believe it will be helpful to here summarize their pertinent provisions:

1. A report of values is due on the last day of each month of the policy term, but a 30-day grace period is allowed for the filing thereof (par. 8A).

2. The policy is not voided by delinquency in reporting; on the contrary it is provided that the policy shall still "cover," but subject to the following restrictions:

> (a) The policy shall cover for not more than the amount specified in the last report of values filed prior to the loss; that is to say, the limit of liability specified in the policy is thereby reduced to the amount reported in the last report of values (par. 8B).

(b) If it is the first report of values which is delinquent, the policy covers only at the locations specifically named therein (par. 8B).

3. Liability for a loss is limited by the last report of values filed prior to the loss so that an insured who under-reports is thereby penalized (par. 9—honesty clause).

4. Liability for a loss shall not exceed the proportion of the loss which the limit of liability specified in the policy bears to the actual value of the property (par. 9—coinsurance clause).

Appellants did not file any report of values under the policy in suit prior to the fire,[2] which occurred February 14, 1946, but on February 26, 1946, appellants reported the value of the property at the time of the fire as $29,-625.20 [Findings, par. VII, Tr. 44]; and subsequently filed proof of loss setting forth the value of the property at the time of the fire as $29,625.20, damage to the property by the fire in the sum of $27,253.18; and that the amount due under the policy was the sum of $13,798.50 [Findings, par. VII, Tr. 44].

Appellants arrived at this amount as follows: Since the policy was effective at noon December 31, 1945, the first report of values was due thereunder on January 31, 1946, and would not be delinquent for 30 days thereafter or

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[2]The district court concluded that the last report of values filed under a prior policy (No. 013121) which expired December 31, 1945, and which report was filed with appellee on January 3, 1946, and reported values as of December 31, 1945, must be considered in determining appellee's liability under the policy in suit (No. 4801476) [Findings, par. VIII, Tr. 44-5]. We shall discuss that finding hereinafter (see Point V, Argument) and show that it is in error.

until March 2, 1946; therefore, no report was required to be filed prior to the occurrence of the fire on February 14, 1946. An examination of the form discloses that where the loss occurs before the first report of values is filed, the only provisions determining and limiting the amount of recovery are the limit of liability (here $15,-000.00) and the coinsurance clause. The determination of the insurer's liability under the coinsurance clause is a simple mathematical calculation expressed as follows: That proportion of the loss ($27,253.18) which the limit of liability ($15,000.00) bears to the value of the property ($29,625.20), to wit, the sum of $13,798.50.

But even if it be held, as it was by the District Court, that a report was due on the policy in suit on December 31, 1945, which was the inception date of the policy, the result would be no different. Under that theory, the 30-day grace period would have expired January 30, 1946, and so the report would have been delinquent at the time of the fire. But, as we have shown, the policy provides in detail in paragraph 8B what the penalties shall be for delinquent reporting; and it is there specifically provided that where the first report is delinquent, the policy shall nevertheless "cover" but only at the locations named in the policy. Therefore, the amount of recovery is again arrived at by applying the same formula as before.

The district court rejected the above reasoning. It held that delinquency in filing the first report of values would void the policy; that a report under this policy was due on December 31, 1945, the inception date of the policy, and would have been delinquent on January 31, 1946; but that delinquency (and consequent voidance of the policy) was avoided by the report of values of January 3, 1946, which was the last report of values filed

under the prior policy (No. 013121), but which the court held to also be a report under the policy in suit. It construed that report to be the last report of values under the policy in suit within the meaning of the honesty clause [Findings, par. VIII, Tr. 44-5] and limited appellants' recovery accordingly to the sum of $1,936.92. It was admitted that this report of January 3, 1946, underreported the value of the merchandise on hand as of December 31, 1945, in that the actual value of merchandise on hand on that date was in the sum of $28,140.72, whereas the report set forth values in the sum of $2,000.00.

It was also admitted that under the prior policy[3] (No. 013121) appellants consistently underreported the value of the insured property in their monthly reports of value. As appears from the Agreed Statement, paragraphs VIII and IX [Tr. 27-29], and the Findings, paragraph VI [Tr. 43-44], there were twelve reports of value filed under that policy commencing as of January 31, 1945, and ending as of December 31, 1945,[4] in which appellants reported values ranging from $8,000.00 to $2,000.00, when in fact the values ranged from some $28,000.00 to some $19,000.00. Appellee contended that these low reports under the prior policy constituted concealment and misrepresentation as to the policy in suit [Answer, Tr. 13-16]. The District Court found against appellee on

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[3]The old policy expired December 31, 1945, at noon and the new policy took effect at that time. The new policy and the old policy were identical in terms except that in the new policy the provisional amount was reduced from $15,000 to $4,400.00, the limit of liability from $30,000.00 to $15,000.00 and the deposit premium from $144.00 to $100.00. [Exhibits 1 and 2.]

[4]The report of January 3, 1946.

this defense on the ground that the understatements of value were immaterial, since the insurer had protected itself by the honesty clause [Findings, par. IX, Tr. 45; Opinion, Tr. 36-39]; and the court further found that the values reported were actually far less than appellants could have reported under the minimum premium provided for by the policy; that is to say appellants could have reported far larger values without incurring liability for increased premium [Findings, par. IX, Tr. 45; Opinion, Tr. 37].

In any event, the findings on the issue of concealment and misrepresentation were against appellee, and since appellee has not appealed from the judgment it would appear that those issues have been finally determined adversely to appellee for the purposes of this lawsuit, and are therefore not before this Court on this appeal.

After the judgment was entered in appellants' favor for the sum of $1,936.92, they filed a motion for a new trial and to open the judgment for the purpose of taking additional testimony, for the principal purpose of getting into evidence, the actual report of January 3, 1946 [Tr. 48-50]. A true copy of the report was attached to the motion [Tr. 66] and it shows on its face that it was filed under and had reference only to the prior policy (No. 013121) and covered the period from December 1, 1945, to December 31, 1945. The District Court denied the motion.

Appellants have taken this appeal from that portion of the judgment which denies them judgment in the sum of $13,798.50 or in any sum in excess of $1,936.92, and from the order denying their motion for new trial and to open the judgment and take additional testimony [Tr. 69].

Specification of Errors.

The District Court erred:

1. In making so much of finding of fact number VII as finds that a report of values was due on December 31, 1945, and was delinquent on January 31, 1946.

2. In making finding of fact number VIII.

3. In making conclusion of law number I that appellants were only entitled to judgment against defendant in the sum of $1,936.92 and in failing to conclude that appellants were entitled to judgment in the sum of $13,798.50.

4. In denying appellants' motion for new trial and to open the judgment and take additional testimony.

5. In failing to find that under the terms of the policy even if a report of values was due on December 31, 1945, and delinquent on January 31, 1946, since such report was the first report due under the policy and there was no penalty for delinquent filing, the applicable limit of liability was that set forth in the last portion of paragraph 9 (the coinsurance clause).

6. In failing to find that under the terms of the policy the first report of values was not due until January 31, 1946, and not delinquent until 30 days thereafter, and therefore the report of values filed on February 26, 1946, complied with the policy terms.

7. In finding that the report of January 3, 1946, was a report under the new policy and limited appellants' recovery to the sum of $1,936.92.

ARGUMENT.

I.

Summary of Argument.

Appellants' contentions may be summarized as follows:

1. Under this provisional reporting form policy with its value reporting clause and honesty clause, once the first monthly report of values is filed, the insured's recovery is thereafter limited by his last report of values, if he underreports his values; and once the first monthly report of values is filed, if the insured is thereafter delinquent in his monthly reports, his recovery is limited to the amount reported in his last report of values. But under the express provisions of the policy, between the inception date of the policy and the filing of the first report of values, the insured's recovery is limited only by the limit of liability and the coinsurance clause; and this is so even though the first report of values is delinquent, because the policy expressly provides that in that event the policy shall still "cover," but only at the locations specified in the policy. To hold, as the district court did, that delinquency in filing the first report voids the policy is to read into it a provision which is directly contrary to the policy provisions, and contrary to applicable rules of construction.

2. Since the policy was written on the 31st day of December 1945 for one year and required the filing of monthly reports of value (with a 30 day grace period) on the "last day of each month of the policy term," the

first report was not due until January 31, 1946, or delinquent until March 2, 1946, and hence no report was delinquent at the time of the fire on February 14, 1946. The district court's conclusion that the first report was due December 31, 1945, the inception date of the policy, was therefore in error.

3. The policy in suit took effect upon the expiration of a prior policy in the same company. The last report of values under the old policy was filed January 3, 1946. Since each policy is a separate and distinct contract, the references in the value reporting and honesty clauses of the new policy to reports must be deemed to be to reports under that policy and not to reports filed under the old policy; and the last report filed under the old policy may not be used to limit the insured's recovery for a loss occurring under the new policy. The report of January 3, 1946 was a report under the old policy and the district court's conclusion that it was also a report under the new policy and limited appellants' recovery was in error.

4. Since the case was tried on an Agreed Statement, and since the district court misconstrued the reference therein to the report of January 3rd and construed it to be a report under both the old and new policies; and since this erroneous construction formed the basis of its decision, it was an abuse of discretion to deny appellants' motion for new trial and to reopen the judgment so that the report itself could be introduced in evidence where the report showed on its face it was made only under the old policy.

II.

The Applicable Rule of Construction.

Since the problem here involved revolves around the proper interpretation of the policy provisions, we here set forth the rules of construction applicable in California to insurance policies. These rules are so well settled that no extended citation of authority is necessary.

The general rule is succintly stated in the recent case of *Culley v. New York Life Ins. Co.,* 27 Cal. (2d) 187, 163 P. (2d) 698:

> "* * * Any doubt as to the meaning of the policy must be resolved in favor of the insured under well known rules of interpretation."

And as was held in the case of *Fageol Truck & Coach Co. v. Pacific Indemnity Co., et al.,* 18 Cal. (2d) 731, 117 P. (2d) 661, where open to more than one interpretation, a policy should be so construed as to give the greatest protection to the insured:

> "But if there be any ambiguity in the Detroit policy, it must be resolved against the insurer (*cit.*). If to give the quoted clause the meaning contended for would release Detroit from liability, then it must be construed so as to permit recovery since it is 'susceptible of such construction.' Where two interpretations equally fair may be made, that which affords the greatest measure of protection to assured will prevail."

And where there is a conflict between two provisions in a policy:

> "the general rule should apply that where the language of the policy is susceptible of two constructions

that which is most beneficial to the insured should be adopted."

Frenzer v. Mutual Benefit, etc. Ass'n., 27 Cal. App. (2d) 406, 81 P. (2d) 197.

The reason for the rule is stated in *Siskin v. Alliance Ins. Co.*, 200 Cal. 70, 251 Pac. 922:

"* * * It is a well settled rule of interpretation that the terms of said clause in said policies are to be construed liberally in favor of the insured and strictly against the insurer, and this by reason of the fact that whatever ambiguity or uncertainty exists therein has been caused by the insurer."

III.

Delinquency in Filing the First Report Does Not Void the Policy; and Until the First Report Is Filed the Only Limit of Liability Is the Coinsurance Clause.

It is appellants' contention that the provisions of the policy are clear and unambiguous, and that by attributing to each part of this carefully drafted form its plain meaning, there is not the slightest difficulty in solving the problem here presented.

Appellants' position may be stated as follows: From and after the time that *the first report of values is filed* by the insured with the insurer, the insurer has fully protected itself by reason of any subsequent delinquency in filing of reports. But, for reasons best known to it, the insurer has failed to provide any penalty (other than that the policy shall cover only at the locations specified) for *delinquency in filing the first report*. Likewise, for reasons best known to the insurer, the honesty clause is

so worded that it does not operate during the period from the inception date of the policy to the filing of the first report of values. It is only after the first report of values has been filed that the honesty clause comes into play, and thereafter during the life of the policy, the insured is limited in his recovery by the values set forth in his last report of values, and if he has underreported those values, his recovery is correspondingly reduced. In this way, the insurer has protected itself from underreporting by the insured. At the same time, the insurer has provided (paragraph 14) that it may at any time during the term of the policy or within one year after its expiration, audit the insured's records and examine the insured property to determine the true values at risk during the policy term, and thus determine and collect the premium actually due, even though the insured may have underreported his values. In other words, and as found by the District Court, underreporting of values is a matter of complete indifference to the insurer as it cannot be harmed thereby.

Under the plain language used in the policy, it is submitted that until the first report of values is filed, the only provisions limiting the amount of recovery are (1) the limit of liability (here $15,000.00) and (2) the co-insurance clause contained in paragraph 9.

Here then we have a situation where the form has been meticulously drawn in order to fully protect the insurer against understatements and delinquencies in reporting *from the time the first report of values is filed.* Had the insurer desired the same protection during the initial period from the inception of the policy to the filing of the first report, it could have easily provided that a report of values must be filed at the time the policy is written, and

have limited recovery to those values during that initial period. For reasons best known to it, the insurer did not see fit to so provide. Instead, it specifically provided that where the first report is delinquent the policy shall nevertheless "cover" at the locations named in the policy.

If we omit from consideration for the moment, the report of January 3, 1946 which was filed under the old policy but which the district court construed to also be a report under the policy in suit, and if it be assumed that no report was due until January 31, 1946 or delinquent until 30 days thereafter, then it is clear that the fact that no report had been filed at the time of the loss would not prejudice the insured's right of recovery. Indeed, the district court so held in its opinion:

> "* * * it has been held in cases dealing with similar policies that where the loss occurs before a required inventory is taken, but within the grace period, or where no grace period is provided, within a reasonable time, an inventory or report made after the loss is sufficient upon which to base recovery (*cits.*)" [Tr. 34].

We do not find any provision in the form requiring, as indicated by the District Court, that in such a situation, a report must be filed *after* the loss in order to entitle the insured to recover. It is submitted that the rights of the parties should be deemed fixed as of the time of the fire, and all the insured need do after the loss is to file his proofs of loss, and the amount of his recovery will be limited only by the limit of liability and the coinsurance clause. However, appellants did file a report of values after the loss on February 26, 1946, so if it be concluded that such a report was required, appellants have complied.

We now come to the question of whether delinquency in filing the first report of values results in voiding the policy. The district court held that the first report of values was due on December 31, 1945 and so was delinquent at the time of the fire unless the report of January 3, 1946 be regarded as a report under the policy in suit. While we disagree with this conclusion and will hereinafter point out the reasons why we believe it is erroneous, for the purposes of the present discussion it will be assumed that the first report was delinquent at the time of the fire. The district court concluded that if the first report was delinquent at the time of the fire, the policy was thereby voided and the insurer was under no liability whatsoever:

> "If plaintiffs' contention that the January 3rd report was not made under the new policy is accepted, they are in complete default, since the thirty day grace period expired on January 30, 1946. Where there has been no evaluation at all, and a definite period is set within which to state the value; a failure by the insured to comply with the requirement is sufficient ground for the insurer to avoid all liability (*cits.*)" [Tr. 35].

In order to determine the answer to this question, we submit that the policy form must be looked at by itself without regard to the prior policy or any reports submitted under it; for this is a pure question of policy interpretation and the answer arrived at in this case should apply equally in any case where the first report is delinquent, even though no prior policy is involved.[5]

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[5]The effect of the January 3rd report and the prior policy will be discussed hereinafter.

Taking the form by its four corners, it is submitted that it is entirely clear and unambiguous, and is not open to the construction that delinquency in *filing the first report* subjects the insured to any penalty other than is specifically stated therein. The policy specifically provides in detail what the penalties for delinquent reporting shall be. To add the further and drastic penalty of avoidance in the face of specific language in the policy that it shall continue to "cover" does violence to all rules of construction applicable to insurance policies. To so hold requires the ignoring of the clearly expressed provisions of the policy, the creation of an ambiguity where none exists, and the construction of that ambiguity in favor of the insurer.

In support of its construction of the policy, the District Court cites four cases. An examination of these cases readily discloses that none of them are authority for the District Court's holding. Two of the cases, *Royal Ins. Co. v. Kline Bros.*, 198 Fed. 468, and *Istrouma Mercantile Co. v. Northern Assurance Co.*, 165 So. 11, dealt with entirely different types of policies and reports, *and in each case the policy contained a specific provision voiding it for failure to keep or file the required reports.* In view of such a provision, these cases can be of no help in interpreting the policy in suit.

The other two cases cited by the District Court are *Atlantic Fruit Co. v. Hamilton Fire Ins. Co.* (N. Y.), 167 N. E. 184, and *Rivaz v. Gerussi Bros.*, 6 Q. B. D.

222. These cases are cited in support of the District Court's statement that—

> "It is material that the declaration of values be within the period of grace, for if the insured could wait until the risk was past, and then understate the value of the property which had been subject to the risk, he would get the benefit of full coverage with an unjustly low premium."

The *Atlantic Fruit Co.* case dealt with an entirely different form of provisional reporting policy which did not contain a "Value Reporting Clause" (paragraph 8) or an honesty clause (paragraph 9) or any analogous clauses. Nor did the case deal at all with the question of delinquency in filing the first report of values. The question involved was as to the effect of repeatedly underreporting values (under a single policy), and the court held that the policy was thereby voided. But clearly that holding is entirely inapplicable to the policy in suit in view of its "Value Reporting" and honesty clauses. Indeed, the District Court in the case at bar squarely held that in view of those clauses the policy would not be avoided by understatements of value. It is submitted that the holding in the *Atlantic Fruit Co.* case has no bearing whatsoever on the question of whether the policy in suit is voided by delinquency in filing the first report of values.

The *Rivas* case likewise is not in point. It involved several open marine policies and the effect of concealment of material facts at the time the policies were taken out. Indeed, at a later point in its Opinion [Tr. 38-9], the District Court points out that the case is of no assistance.

As to the District Court's statement that to permit the insured to recover where his report is delinquent would enable him "to wait until the risk was past, and then understate the value of the property which had been subject to the risk," thereby enabling the insured to "get the benefit of full coverage with an unjustly low premium," there are several answers:

(a) We are here concerned only with delinquency in filing the first report, and since the form was so drafted by the insurer to permit recovery where the first report was delinquent, subject only to the limitations specified in the form, it is neither just nor proper nor the function of a court, to refuse to enforce the policy as written in order to relieve the insurer from a supposed "unjust situation" which it itself created by drafting the form as it did.

(b) The situation imagined by the court could only occur under this policy with its value reporting and honesty clauses where it is the first report that is delinquent. But the insurer may always avail itself of its opinion to cancel the policy if the insured fails to file the report within the time specified, and if the insurer continues on the risk when the report is delinquent, it should not be heard to complain of the delinquency, especially where, as here, the policy specifies no penalty. Indeed, the case of *Schenley Distillers Corp. v. U. S. Fire Ins. Co.*, 90 F. (2d) 633 (cited in the Opinion herein) infers that there is a duty upon the insurer to protest to the insured if the latter is dilatory in his reports.

(c) Since we are here concerned only with delinquency in the first report, the situation imagined by

the court could not occur; that is to say, the risk could not pass and thus enable the insured to "get the benefit of full coverage with an unjustly low premium." It is inconceivable that an insurer would permit the policy to run the entire policy period without requiring a report to be filed or, in the alternative cancelling the coverage. If it does so, it would have only its own inattention to its business to blame for its predicament. And, with its right of audit it can always ascertain and collect the full premium to which it is entitled.

(d) Since delinquency in filing any report other than the first report does not void the policy, what rule of construction justifies placing a different interpretation where it is the first report that is delinquent, where there is no language in the policy so providing?

Summarizing the foregoing, it is submitted that the only reasonable construction of the policy in suit is that if a loss occurs *before the first report of values is filed,* regardless of whether the first report is delinquent, the insured is entitled to recover the amount of his loss, limited only by the limit of liability and the coinsurance clause; that even if the policy were also open to the construction adopted by the District Court, namely, that delinquency in reporting voids the policy, it is nevertheless also open to the construction urged by appellants, and under well settled rules applicable to insurance policies, the construction most favorable to the insured must be adopted.

IV.

No Report Was Due on the Policy in Suit Until After the Fire.

The District Court concluded that a report of values was due under the policy in suit on December 31, 1945, which was the inception date of the policy:

> "A report of values was due on the last day of each month of the policy term, so a report of values was due under the new policy, as well as on the old policy on December 31, 1945. If it be argued that no report could be expected since the policy covered only one day in the month of December, this departure from the express words of the contract would put us in the difficult position where we must determine how and where to draw the line. Would a report be due if the effective date were December 30, or December 20, or December 16? Must the policy have been effctive a week, or half a month, or the whole month? The words of the policy are clear and unambiguous in this regard—under the new policy a report was due on December 31, 1945."

It has already been pointed out (Point III), that it is immaterial whether the first report of values was or was not delinquent at the time of the loss; in either event, the measure of recovery would be the same. Nevertheless, since the District Court directly held that a report was due on December 31, 1945, and since it seems clear that it was this holding that led the District Court to further conclude that the report of January 3, 1946, was a report under the new policy, we deem it important to show wherein the District Court erred in concluding that a report was due under the policy in suit on December 31, 1945.

Although the policy in suit took effect upon the expiration of a similar (though not identical) prior policy, it was, as stated by the District Court, "a separate and distinct contract," and it seems clear that the requirements as to filing reports under the new policy must be determined by an examination of the provisions of that policy without regard to the fact that it succeeded a prior policy; in other words, no different number of reports would be required under the new policy if it had been the first policy written by the appellee for the appellants. However, we do believe it is proper to look at the reporting practices under the prior policy in order to see what interpretation the parties themselves put upon similar reporting provisions of a policy which also took effect on December 31, but of a prior year.

Here we have a policy which is effective at noon on December 31, 1945, for a period of one year. The policy says that the insured shall file a report with the company "on the last day of each month of the policy term." It is submitted that giving this language its ordinary meaning, and using a common sense approach, one would conclude that the policy term encompassed twelve months; that this in turn means that there would be twelve reports to file, the first one at the end of the first month, to wit, January 31, 1946, and the last one at the end of the last month, to wit, December 31, 1946. We do not believe anything is to be gained by asking, as the District Court did, what the situation would be if the policy were written on December 20 or December 16. Apparently the court concluded that no matter when the policy was written, thirteen monthly reports were required. We express no opinion as to that, preferring to confine ourselves to the precise question here involved, viz., when the first

report is required to be filed under a policy written on the last day of a month. It is submitted that to hold that a report is required on the very day the policy is written where the policy speaks of "the last day of each month of the policy term" does violence to the plain meaning of the language used and to well settled rules of construction.

Section 10 of the California Civil Code provides that time shall be computed as follows:

> "The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it is also excluded."

That this section is to be used in construing an insurance policy appears from the case of *Law v. Northern Assurance Co.*, 165 Cal. 394, 132 Pac. 590:

> " 'Insurance hereunder to cease 30 days from this 19th day of March, 1906 at noon' could only mean that excluding the first and including the last day, the term of the contract would expire on April 18th at noon (Civ. Code, Sec. 10; Code Civ. Proc., Sec. 12)."

And a similar result was reached in the case of *Homestead Fire Ins. Co. v. Ison* (Va.), 65 S. E. 463, where the policy provided it was to be void unless an inventory was made within 30 days of its issuance. The policy was issued February 8, 1907, and the fire occurred at 11 P. M., March 10, 1907. The court held that the time for preparing the inventory had not expired at the time of the fire:

> "When an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day designated and to include the last day of the specified period. * * *

Assuming that the 30-day period in the case at bar began to run from the date of the policy, and excluding that day, * * * the time had not expired by one hour at 11 o'clock, Sunday night, March 10th."

See also:

Messner v. Superior Court, 101 Cal. App. 172, 281 Pac. 503.

No good reason appears why the foregoing rule should not be applied here, and therefore excluding the first day (December 31st), the last day of the first month of the policy term would be January 31st, on which day the first report would be due; and the 30-day grace period would expire on March 2nd, which was after the fire (February 14) and after the date on which appellants filed their first report (February 26).

Furthermore, the construction put by the parties on identical reporting provisions of the prior policy, which was also written on the last day of the month (December 31, 1944), shows that they construed it to require only twelve reports, commencing January 31, 1945, and ending December 31, 1945. This appears from the Agreed Statement, paragraph IX [Tr. 27-29], from the findings, paragraph VI [Tr. 43], and from Defendant's Exhibit A, which is the Premium Adjustment Statement rendered to appellants by appellee under the old policy upon the termination of that policy [Tr. 83]. The original Exhibit A is before this court and it shows *twelve* reports of values submitted under that policy commencing with January and ending with December and covering the period *commencing December 31, 1944,* and ending December 31, 1945.

We believe a complete answer to the contention that thirteen reports are required under this form is found from an examination of Exhibit A itself. For the convenience of the court a photostat copy of a copy of Exhibit A is reproduced in the appendix hereto. It is a printed standard form used by the insurance companies. It will be noted that, as to each location, the form makes provision for the insertion of only twelve values. If thirteen reports were contemplated, there would certainly have been thirteen spaces provided. Apparently, the insurance companies regard their form as requiring only twelve reports. Such construction by the drafters of the form, including appellee, should satisfy this Court of its correctness.

V.

The Report of January 3, 1946, Was Not a Report Under the Policy in Suit.

The District Court concluded that a report was due on the policy in suit December 31, 1945; also that if the first report was delinquent at the time of the fire, the policy was void. We believe that we have shown (Points III and IV, *supra*) that these conclusions were in error.

Having so concluded, the District Court went on to hold that the report of January 3, 1946 which was admittedly a report under the old policy, was also a report under the new policy and hence determined the amount of appellants recovery:

> "Plaintiffs' report of January 3rd was within the terms of paragraph 8 (A), and since they made no other report during January, the conclusion is inescapable that the single report covered both the old and the new policies. They stated that the property

was worth * * * $2,000 on December 31, 1945. If it was worth $2,000 under the old policy on that day, it was worth no more under the new one. They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied on to compute the company's liability. The mere circumstance that the report they made was also within the terms of the old policy, which was a separate and distinct contract, does not alter the fact that it was within the terms of the new policy. To hold otherwise would enable the plaintiffs to profit by their own wrong, and would void the policy as hereinafter discussed."

Careful analysis of the foregoing holding discloses that a most unusual and we believe erroneous result has been reached. The District Court's conclusion means simply this: that under the first provisional reporting form policy taken out by an insured with a given company, there is no penalty for delinquency in filing the first report of values, and if the loss occurs before the first report is filed, the insured's recovery is limited only by the limit of liability and the coinsurance clause (see Point III, *supra*).[6] But, where the policy is the second (or third, etc.) policy in the same company, then the last report of values filed under the old policy must be deemed to also be the first report under the new policy, and thus come within the honesty clause of the new policy, which limits recovery to "the last value reported to this company prior to the loss."

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[6]We realize that the district court did not so conclude. However, we believe we have shown that a proper construction of the policy requires such a conclusion.

It is submitted that the mere statement of the proposition demonstrates that it is untenable. The words used could not have one meaning when the form is attached to an initial policy and another when it is attached to a second or renewal policy.

Here, as was stated by the District Court, we have two entirely "separate and distinct contract(s)." They make no reference to each other and certainly there is no language in the new policy which directly states or even remotely infers that the various references to reports of value in any way refer to reports filed under prior policies. It is submitted that the only reasonable construction of the policy is that, in every instance, the reference to reports is to reports required to be filed under that particular policy. To hold otherwise would be to completely ignore settled rules of construction applicable to insurance policies. In the absence of clear language in the policy expressly stating that reports under prior policies are to be included, it is submitted that they may not be considered in any way in determining the liability of the insurer under a new policy.[7]

Whether we call the policy in suit a renewal policy or an entirely new and separate contract the result is the same. In either case, it is a "separate and distinct contract."

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[7]In its Opinion [Tr. 39] the district court stated that "a material misrepresentation under a prior connected policy is sufficient to void the policy sued on." But it found the misrepresentations here to be immaterial and so dismissed the point. In any event, the question of what is or is not a misrepresentation has no bearing on the point here under discussion which is solely one of policy construction.

> "A renewal of a policy of fire insurance is, in effect, a new contract of insurance, and unless otherwise expressed, on the same terms and conditions as the original policy * * *"
>
> *Shock v. Penn. etc. Ins. Ass'n.,* (Pa. Super. Ct.), 24 A. (2d) 741.
>
> "But this is not a renewal of the anterior insurance. It is an independent contract of insurance. If a simple renewal of older insurance had been effected, an action would necessarily have to be brought upon the former policy."
>
> *Arlington Co. v. Empire City Fire Ins. Co.,* 101 N. Y. S. 772.

Actually, in the case at bar, the new policy differed in two important respects from the old policy; the provisional amount was reduced from $15,000.00 to $4,400.00 and the limit of liability from $30,000.00 to $15,000.00 [Agreed Statement, pars. III and VIII, Tr. 26-27, 77-78; Opinion, Tr. 30-31]. In view of these changes, we do not believe it proper to refer to it as a renewal policy.

An examination of the Agreed Statement, the short transcript of the trial, the Opinion and the Findings make clear that the report of January 3rd[8] was in fact a report only under the old policy, and that the finding of the District Court that it was also a report under the new

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[8]A copy of the report was attached to the motion for new trial [Tr. 66] and will be referred to under Point VI, *infra.*

policy resulted from its erroneous construction of the policy.[9]

In support of that statement we refer the Court to the following:

(a) Paragraphs VIII and IX of the Agreed Statement [Tr. 27-29], refer to the old policy and then state:

IX.

> "That commencing on or about the 31st day of January, 1945, plaintiffs reported to defendant, in writing, what purported to be the actual cash value of the property described *in said policy* * * * as follows: * * *"

Then follow the twelve reports of value filed under the old policy commencing with the report of January 31, 1945 and *ending with the report of January 3, 1946.*

(b) The following statements of court and counsel at the very short trial when the case was submitted on the Agreed Statement:

> "The Court: * * * In other words, in this case they have reported either two or three thousand dollars each reporting period and had not made the report at the end of the month preceding the fire; that then after the fire they reported this 27 or 29 thousand dollars * * * [Tr. 79]. * * *

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[9]It has been held that the rule that findings shall not be set aside by an appellate court unless clearly erroneous, has no application where the case is submitted on an agreed statement of facts,

U. S. v. Kern River Co. (C. C. A. 9), 264 Fed. 412,

or where the evidence is all documentary,

U. S. v. Mitchell (C. C. A. 8), 104 F. (2d) 343.

To the same effect see:

Equitable Life Assur. Soc. v: Irelan (C. C. A. 9), 123 F. (2d) 462.

The Court: *As I understand, it is your contention,* Mr. Penney, *that each year represents an independent contract and has no relation to the old; and it is the contention of the defendant that they are tied in by reason of the experience of the previous year* as a basis upon which the deposit is made for the next year.

Mr. Penney [Plaintiffs' counsel]: That is correct, your honor, but that is only for the minimum deposit premium.

The Court: That is correct, the minimum deposit.

Mr. Penney: And I think it is further stipulated—

Mr. Davis [defendant's counsel]: and it is also to determine the limit of liability.[10] [Tr. 83-4] * * *

Mr. Penney: I think they could raise that question at any time under the old policy. My theory here is just this: *That under the new policy there it is the first report he had to make and that where the loss occurred under the new policy they cannot go back to the old policy and tie the old policy in to the new policy.* That is our whole case. If the loss had occurred in 1945 he would not have had any 30 day grace at that time because the policy does not provide that. The provision of the policy is that on the first report, and it is my contention they are separate contracts" [Tr. 85-6].

(c) The Final Premium Adjustment statement under the old policy [Exhibit A] also lists the twelve reports filed under that policy starting with January 1945 and concluding with December 1945 (the January 3rd report).

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[10]In this case, it resulted in a reduction in the limit of liability from $30,000.00 in the old policy to $15,000.00 in the new policy.

(d) The District Court's Opinion which definitely finds the report of January 3, 1946 to be a report under the old policy, but construes it to also be a report under the new policy, apparently as a result of the Court's conclusion that a report was due under the new policy on December 31, 1945.

(e) Paragraph VI of the findings [Tr. 43-4] which states:

> "That under said policy of insurance [the old policy] the plaintiffs reported to the defendant at the end of each month the values on hand for the preceding month."

Then follows reference to the twelve reports filed under the old policy ending with the report of January 3rd.

And paragraph VIII of the findings [Tr. 44-5] where the Court states:

> "The Court finds that under the terms and conditions of the policy in effect at the time of the fire the report made on January 3, 1946 determines the liability of the defendant to the plaintiff * * *."

It is submitted that the foregoing indicates quite clearly that the Court and counsel understood the report of January 3rd to be, and in fact it was, the last report of values filed under the old policy, and that it was not intended as nor was it a report under the new policy; that it was only the Court's construction of the policy, in particular its conclusion that a report was due under the new policy on December 31, 1945, that led the court to "construe" the January 3rd report to also be a report under the new policy.

Under the circumstances, it is submitted that the district court's finding that the report of January 3rd was a report under the new policy was erroneous.

VI.

The Motion for New Trial and to Open the Judgment Should Have Been Granted.

Appellants maintain (Point V, *supra*) that the evidence presented to the District Court permits only one conclusion, viz., that the report of January 3rd was a report under the old policy and was not a report under the new policy. However, if this Court should conclude that it is unable to state that the District Court was in error on the evidence presented to it, in concluding that the report of January 3rd was a report under both policies, then appellants maintain that it was error for the District Court to deny appellants' motion for new trial and to open the judgment to take additional testimony, so that the report of January 3rd could be introduced in evidence, thus replacing conjecture as to its scope with certainty.

Appellants are fully cognizant of the rule that ordinarily the action of the District Court in granting or denying a new trial under Rule 59 is a matter of discretion and will not be reviewed on appeal. However, like most matters within the discretion of a trial court, where the court has abused its discretion, such abuse is subject to correction on appeal.

> "It is assigned as error that the trial court abused its discretion in denying the motion for a new trial. Ordinarily the ruling of the trial court on motion for a new trial is not subject to review the motion being addressed to the sound discretion of the trial court. There is, however, an exception to this rule in cases where the trial court has, as the law terms it, abused its discretion."

United Press Ass'n v. Nat'l Newspaper Assn. (C. C. A. 8), 254 Fed. 284.

"Under certain circumstances the appellate court may inquire into the action of the trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion (cits.); or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced (cits.)."

Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 77 L. Ed. 439.

To the same effect, see also:

Oras, et al. v. U. S. (C. C. A. 9), 67 F. (2d) 463;
Yeates v. U. S. (C. C. A. 5), 254 Fed. 60;
Glenwood Irr. Co. v. Vallery (C. C. A. 8), 248 Fed. 483.

The chief purpose of appellants' motion was to reopen the case so that the report of January 3rd could be introduced in evidence. It is appellants' contention that under the circumstances here existing it was a manifest abuse of discretion for the District Court to refuse to reopen the case to permit the introduction of this report in evidence.

As appears from the affidavits filed in support of the motion, the actual report was not offered in evidence at the trial, because of the inadvertence of appellants' then counsel.[11] On March 18, 1946, after the court's opinion

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[11]The affidavit of appellants' former counsel states as follows in this regard:

"That through inadvertence of your affiant, your affiant neglected to have a true copy of said report of values dated January 3, 1946, attached to the Agreed Statement of facts herein as an exhibit or to offer the same in evidence on behalf of plaintiffs at the trial of this case." [Tr. 67].

was rendered, the omission was discovered and called to said counsel's attention by appellants' present counsel, with a request that he immediately move to reopen the case. Before so doing, appellants' former counsel attempted to obtain a stipulation from defendant's counsel allowing the report in evidence. This failed, and at about the same time (March 25) the findings were signed and the judgment entered. The motion was filed by appellants' present counsel on March 31 [Tr. 60-67].

It cannot be denied that this report goes to the very essence of the case, both of appellants and appellee. Certainly, both appellants and appellee and their respective counsel knew what the report stated, and when they referred to the report in the Agreed Statement it was that report in its actual form that they were referring to. And when the Agreed Statement was submitted to the Court at the trial, it seems clear from the remarks of counsel that it was assumed that everyone understood that the report was a report under the old policy. And as appears from the findings and Opinion, it is this report that formed the very basis of the District Court's disposition of the case. As stated in the Opinion "* * * the conclusion is inescapable that the single report covered both the old and the new policies." Having so construed the report, the District Court concluded that recovery was limited by the values specified in said report.

There is not the slightest doubt that had the District Court had the opportunity to examine the report before reaching its decision it would have concluded that it was a

report only under the old policy. This appears from the following comment made by the District Court when it denied the motion for new trial:

> "* * * You have asked for a new trial and asked to introduce the notice. I feel *if the notice is as you claim,* I would have to deny any judgment because I think it admits one of two things. It either admits they failed to comply with the terms of the policy or your client is guilty of fraud" [Tr. 87].[12]

A copy of the report is attached as an exhibit to appellants' motion [Tr. 66], and an examination of it establishes beyond doubt that it was a report only under the old policy. It is on a printed form furnished by appellee and states in part:

> "STATEMENT OF VALUES AND SPECIFIC INSURANCE.
>
> For the period beginning December 1st, 1945, and ending December 31st, 1945, *under terms of Policy No. 013121* * * *."

It is submitted that under these circumstances it was an abuse of discretion for the District Court to refuse to reopen the case and permit the report to be received in evidence, so that the case could be decided on the true facts instead of a misconception of the facts inadvertently as-

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[12]Appellants' counsel replied to this as follows:

> "Well, we are prepared to take the circumstances whatever Your Honor's ruling may be. But we do feel this, Your Honor, that the case was tried with that report as really the basis of the case on both sides and I think there must have been an inadvertence on both sides that the report was not presented to Your Honor. If we are wrong on the facts or the law after the report is in we are prepared to take the consequences of that, but we feel it should be admitted in evidence, at least to make the record clear." [Tr. 87-8].

sumed by that Court. Here is a case tried on an Agreed Statement and the entire decision hinged on the report of January 3rd which was referred to in the Agreed Statement, but due to inadvertence of counsel it was not introduced in evidence. The Court, not having seen the report, misconstrued its scope, or assumed it was in a form different than it actually was; and then proceeded to decide the case on the basis of this erroneous assumption. While inadvertence of counsel is not to be commended, under the circumstances here present, it was excusable, and justice required that the case be reopened and the report received in evidence. Certainly to have reopened the case for this purpose would have entailed neither considerable delay nor expense to appellee.

In this connection, the following language from the case of *Bowles, etc. v. Six States Coal Corp.*, 64 F. Supp. 651, which involved an application to reopen a case and take additional evidence, is appropriate:

> "The proceeding was filed on December 29, 1944 and counsel for the plaintiff has certainly had ample opportunity to properly prepare said case for trial, and there is no justification or reason existing for the oversight which was allowed to occur by counsel for the plaintiff. However, a lawsuit is not a battle or contest of wits; it is a fair struggle for a just decision, and although considerable inconvenience and expense has been caused the defendants due to the inadvertence on the part of the counsel for the plaintiff, the court does not see how any injury can be done to the defendants or any substantial injustice arise by permitting the introduction of the testimony desired by the plaintiff * * *."

And in the case of *Gossman v. Gossman,* 52 Cal. App. (2d) 184, 126 P. (2d) 178, the test of what constitutes abuse of discretion is stated as follows:

> " 'The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law and in manner to subserve and not to impede or defeat the ends of substantial justice.' * * *
>
> In his work, 'The Nature of the Judicial Process,' Justice Cardozo wrote (p. 141): 'The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.'
>
> *Certainly, a decision rendered in disregard of fundamental facts upon which the parties were relying* or based on facts not adduced at the trial, and unregulated by those principles which are recognized as being inherent in the true concept of judicial discretion would not be a *judicial decision* in the true sense."

A case presenting a situation somewhat similar to that here involved is *Paine, et al. v. St. Paul Union Stockyards Co.* (C. C. A. 8), 35 F. (2d) 624. There judgment was rendered for the plaintiff and defendants moved to reopen

the case for the purpose of introducing further testimony. In denying the motion the District Court stated that:

> "If a new trial should be had and this evidence admitted * * *, it would doubtless result in a substantial modification of the decision which has been made in the case."[13]

The court then proceeded to deny the motion on the grounds that it had no power to grant it, and for that reason refused to consider the newly offered evidence in passing on the motion. On appeal, it was held to be tantamount to a manifest abuse of discretion for the trial court to conclude that it had no power to grant the motion and to refuse to consider the newly offered evidence in passing on the motion, and the case was remanded to the District Court with directions to consider the motion on its merits, and to exercise its discretion in passing on it.

It remains to consider the District Court's statement [Tr. 87] that

> "I feel if the notice is as you claim, I would have to deny any judgment because I think it admits one of two things. It either admits they failed to comply with the terms of the policy or your client is guilty of fraud."

We have already fully discussed (Points III and IV, *supra*), the contention that a report was due on December 31, 1945 under the new policy, and that delinquency in filing the first report of values voids the policy, and we believe we have shown that neither of such propositions is tenable.

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[13]Compare with the very similar language used by the district court in the case at bar in ruling on appellants' motion.

What of the alternative assertion by the District Court that, if the January 3rd report was only under the old policy, appellants were guilty of fraud? At the outset, it should be noted that the use of the word "fraud" was no doubt an inadvertence since there was no issue of fraud before the Court. Appellees' answer raised an issue of concealment and misrepresentation [Tr. 13-16], and appellees' counsel stated at the trial that the issue was one of concealment and misrepresentation rather than fraud [Tr. 79]. As was pointed out in *Telford v. New York Life Ins. Co.*, 9 Cal. (2d) 103, 69 P. (2d) 835, a concealment or misrepresentation may be entirely innocent, so there is a definite difference between a charge of fraud and one of concealment or misrepresentation.

It is difficult to understand by what reasoning the District Court concluded that if the January 3rd report was a report only under the old policy then (but not otherwise) appellants were guilty of concealment. In its Opinion the court considered at length the defense of concealment and misrepresentation and concluded that since the understatements of value did not harm appellee but in fact benefited it, they were not material to the risk and hence constituted no defense.[14]

And as pointed out by the court, section 334 of the California Insurance Code provides that—

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communica-

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[14]Sections 332 and 359 of the California Insurance Code, respectively, require a concealment and misrepresentation to be material in order to void a policy.

tion is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

Since the District Court in effect held that the underreporting, if known to the insurer, would not have "influenced it in forming its estimate of the disadvantages of the proposed contract or in making its inquiries," how can it be said that to hold that the January 3rd report was a report only under the old policy thereby makes the underreporting material. The only way that result could be reached would be by holding that since the insurer's liability for this loss was thereby increased from $1,936.92 to $13,798.50 the underreporting became material. But to so hold would run directly contrary to section 334 of the Insurance Code by making materiality dependent on the event, when that section specifically provides that "materiality is to be determined *not* by the event." It is submitted that if the underreporting was immaterial if the January 3rd report was a report under both policies, it was equally immaterial if it was a report only under the old policy.

Can it be reasonably argued that if appellants' construction of the policy is correct and during the period between the inception of the policy and the filing of the first report of values, the insured may collect his loss limited only by the limit of liability and the coinsurance clause, then underreporting under a prior policy becomes material?

We think not for several reasons:

(a) The District Court's analysis of materiality is equally applicable here. The policy was drafted by the

insurer and to construe it in accordance with its plain meaning should not change the test of materiality.

(b) Admittedly underreporting is immaterial from the second through the twelfth month of the policy term. It would be a strained and peculiar construction to hold it to be material only during the first month and up to the time the first report is filed, especially where the underreporting was under a prior policy.

(c) The clear language of the policy with its "value reporting" and honesty clauses shows that the insurer has given itself all the protection it wanted, and that it considers underreporting to be immaterial.

(d) For the purposes of this case, the finding of the District Court that there was no concealment or misrepresentation is final, and to now give the report of January 3rd its proper effect and to properly construe the policy, cannot result in reopening that finding.

VII.

The Judgment Should Be Modified.

It is appellants' contention that the judgment should be modified by this court by increasing the amount thereof to $13,798.50, and that it is neither necessary nor proper to send the case back for a complete retrial. The findings of the District Court were in favor of appellant on the issues of concealment and misrepresentation. Appellee for reasons best known to it failed to move for a new trial or to appeal from those findings and the judgment entered pursuant thereto. Appellants have not appealed from that portion of the judgment, and it would therefore seem to follow that those issues may not be again litigated in this case whatever disposition is made of the case by this

court. Appellants contend that the District Court's interpretation of the policy was erroneous. If this court sustains that contention, since all other issues have been finally determined in appellants' favor, it would appear to be proper for this court to order the judgment modified, as above suggested.

It is not appellants' desire nor intent to ask for or to obtain a judgment in this case for more than it is entitled. Actually, a judgment for $13,798.50 will not constitute a profit to appellants as their actual loss was approximately twice that amount. Nor will such a judgment be unfair to appellee. It has the right under each policy to receive the full amount of the premium to which it is entitled; and as was held by the District Court, had appellee known of the underreporting, it would still have written the new policy. That a retrial of the concealment issue is not open to appellee is entirely the result of its own choice in failing to appeal from the judgment which determined those issues against it. And that the policy provides as it does and entitles appellants to the said sum gives rise to no ground of complaint by appellee, since it drafted the policy.

It is respectfully submitted that the judgment should be modified by increasing the amount thereof to $13,798.50.

Respectfully submitted,

BENJAMIN J. GOODMAN,

Attorney for Appellants.

APPENDIX.

rm 199BFU—100M—3-46.

FINAL

PREMIUM ADJUSTMENT STATEMENT

FILE NO.

COMPANY THE WORLD FIRE & MARINE INS. CO.

POLICY NUMBER 013121 January 31 19 46

INSURED FULLERTON MANUFACTURING CO.

STATEMENT OF VALUES FOR PERIOD FROM 12/31 19 44 TO 12/31 19 45

ONTH	LOCATION 343 E. Santa Fe Avenue P. 65-1 L.21	LOCATION	LOCATION	LOCATION	LOCATION
N.	5,000.00				
B.	6,000.00				
R.	7,000.00				
R.	8,000.00				
Y	4,000.00				
NE	4,000.00				
LY	4,000.00				
G.	2,000.00				
PT.	2,000.00				
T.	2,000.00				
V.	2,000.00				
C.	2,000.00				
TAL	48,000.00				
ERAGE	4,000.00				
TE	.85 .110				
EM.	34.00 4.40				

ONTH	LOCATION	LOCATION	LOCATION	LOCATION	LOCATION
N.					
B.					
R.					
R.					
Y					
NE					
LY					
G.					
PT.					
T.					
V.					
C.					
TAL					
ERAGE					
TE					
EM.					

RENEWAL DATA

ROVISIONAL AMOUNT FOR RENEWAL

ROVISIONAL PREMIUM FOR RENEWAL

FINAL PREMIUM ADJUSTMENT

DEPOSIT PREMIUM $144.00

Minimum
EARNED PREMIUM 100.00

~~ADDITIONAL~~ OR RETURN PREMIUM 44.00 R/P

THE FOREGOING IS HEREBY CERTIFIED TO BE A TRUE STATEMENT OF THE VALUES SUBMITTED OVER THE SIGNATURE OF INSURED AND RECEIVED IN ACCORDANCE WITH RULES FOR WRITING PROVISIONAL REPORTING FORM POLICIES

WORLD FIRE & MARINE INS. CO.
COMPANY

BY I. Christy

CHECKED BY

DATE